

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

AMY GONZALEZ <i>Plaintiff.</i>)	
)	
v.)	CIVIL ACTION NO. 4-15CV-604-O
)	
DISH NETWORK, L.L.C.)	
<i>Defendant.</i>)	
)	
)	

**MEMORANDUM IN SUPPORT OF
PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT DISH NETWORK
L.L.C.’S MOTION TO DISMISS COUNT I OF PLAINTIFF’S COMPLAINT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Plaintiff, Amy Gonzalez (“Mrs. Gonzalez”), with her Opposition to Defendant Dish Network, L.L.C.’s (“Dish Network”) Motion to Dismiss Count I of Plaintiff’s Complaint and respectfully states as follows:

I. INTRODUCTION AND BACKGROUND

Mrs. Gonzalez filed her Original Complaint in this case on August 10, 2015. (Doc. No. 1). Dish Network filed a Motion to Dismiss on September 03, 2015. (Doc. No. 12). Plaintiff filed an Amended Complaint on September 09, 2015. (Doc. No. 20). Mrs. Gonzalez’s Amended Complaint alleges that Dish Network violated the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A)(iii), by making repeated telephone calls to her cellular telephone after Dish Network was informed via United States Postal Service Certified Mail to only contact her in writing. Many of these calls were pre-recorded messages and placed by Dish Network at

times Mrs. Gonzalez was trying to spend with her family and had to stop her activities to see who was calling.

Dish Network now moves this Court to dismiss Count I of Plaintiff's Complaint because (1) Count I is superfluous as identical to Count II or (2) Plaintiff has failed to allege a viable cause of action.

Therefore, Mrs. Gonzalez submits this brief in an attempt to persuade this Court that Dish Network Motion to Dismiss Count I of Plaintiff's Complaint is moot.

III. ARGUMENTS AND AUTHORITIES

A. Mrs. Gonzalez has filed her First Amended Complaint and renders Dish Network's Motion to Dismiss Count I of Plaintiff's Complaint as moot.

Plaintiff has filed her First Amended Complaint as a right pursuant to Fed. R. Civ. P. 15(a)(1)(B). The filing of an amended complaint renders Dish Network's Motion to dismiss Count I of Plaintiff's complaint as moot. See *Thomas v. Duetsche Bank Nat. Trust Co.*, 2013 WL 673988, *1 (N. D. Tex., Jan 21, 2013) report and recommendation adopted, 2013 WL 673983 (N.D. Tex, Feb 25, 2013)(amended pleading supersedes original complaint making pending motion to dismiss moot); See Also *Alvarez v. The GEO Grp., Inc.*, 2010 WL 3430522, *1 (W.D. Tex., Aug. 30, 2010).

B. Mrs. Gonzalez has amended Count I of her Original Complaint and has dropped Count II in effort to address Dish Network's concerns.

Defendant argues that Count I of Plaintiff's Complaint failed to allege a viable cause of action under the TCPA, §227(b)(1)(A). Defendant points to the fact that standing alone, §227(b)(1)(A) is not a cause of action under TCPA and that Plaintiff must also allege to what telephone line or telephone number the call was made. In addition, Defendant explains that, under §227(b)(1)(A), a cause of action exists only where, for example, "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior written consent."

Mrs. Gonzalez has taken Dish Network argument and position under consideration and believes they have made a valid point. Mrs. Gonzalez has amended her complaint to amend Count I and drop Count II. Mrs. Gonzalez amended Count I is as follows:

47 U.S.C. §227(b)(1)(A)(iii), which states in part;

(b) RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT.—

(1) PROHIBITIONS.—It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

Moreover, Mrs. Gonzalez's Amended Complaint has alleged that (1) Dish Network called her cellular phone number (817) 909-8558, (2) used a type of phone system that is considered an automatic telephone dialing system, because of the numerous pre-recorded

messages she received, and (3) that Dish Network was informed to not contact her on her cellular phone and knowingly made each call without her prior consent to do so.

Thus, Mrs. Gonzalez does not argue Dish Network's position that Count I of Plaintiff's Complaint fails to state a cause of action, but argues that she has amended her complaint to address the matter and Defendant's Motion to Dismiss Count I of Plaintiff's complaint is moot at this time.

III. SUMMARY AND CONCLUSION

Mrs. Gonzalez has taken Dish Network's arguments under consideration and has chosen to file her First Amended Complaint. Mrs. Gonzalez has amend Count I and drop Count II. In addition, Mrs. Gonzalez's Amended Complaint has alleged that (1) Dish Network called her cellular phone number (817) 909-8558, (2) used a type of phone system that is considered an automatic telephone dialing system, because of the numerous pre-recorded messages she received, and (3) that Dish Network was informed to not contact her on her cellular phone and knowingly made each call without her prior consent to do so.

Mrs. Gonzalez does not argue Dish Network's position that Count I of Plaintiff's Complaint fails to state a cause of action, but argues that she has filed her First Amended Complaint address the matter and Defendant's Motion to Dismiss Count I of Plaintiff's complaint is moot at this time.

WHEREFORE, Mrs. Gonzalez respectfully request this Honorable Court to enter an Order finding Dish Network's Motion to Dismiss Count I of Plaintiff's Complaint as moot because Mrs. Gonzalez has filed an Amended Complaint.

Dated: September 09, 2015

Respectfully Submitted,

/s/ Amy Gonzalez
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been forwarded to all counsel on record in accordance with the Electronic Court Filings System Guidelines.

/s/ Amy Gonzalez
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